Office Supreme Court, U.S.
FILED
FEB 25 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 866

MERRITT-CHAPMAN & SCOTT CORPORATION, *Petitioner*

v.

W. WALLACE KENT, *Respondent*
United States District Judge for the Western
District of Michigan

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH F. DEEB
Attorney for Petitioner-Appellant,
Merritt-Chapman & Scott Corporation

Business Address:
600 Michigan Trust Building
Grand Rapids 2, Michigan

Of Counsel:

MANNING, HOLLINGER & SHEA
41 East 42nd Street
New York 17, New York

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Index to Authorities Cited.	
Petition for Writ of Certiorari	1
(a) Judgment to be Reviewed	1
(b) Statutory Provisions Conferring Jurisdiction	2
(c) Questions Presented for Review	3
(d) Statutes Involved	3
(e) Statement of Facts	4
(g) Basis of Federal Jurisdiction	22
(h) Reasons Supporting Review by This Court on Certiorari	22
(i) Argument in Support of Reasons Relied on for the Allowance of the Writ	22
Conclusion	37

APPENDICES

Appendix A—Copy of Opinion of Sixth Circuit Court of Appeals	1a
Appendix B—Motion to Require Amendment of Complaint or in Alternative to Strike	2a
Appendix C—Telegram Dated September 18, 1962 and Letter Dated September 17, 1962	6a
Appendix D—Transcript of Proceedings before Judge Kent on September 21, 1962	8a
Appendix E—Motion for Continuance	26a
Appendix F—Opinion in Albert v. United States, 283 F. 2d 61 (CA 6, 1960) cert. denied 265 U.S. 828 (1961)	30a
Appendix G—Order Denying Stay of Proceedings Pending Review by Supreme Court	34a
Appendix H—Press Release Dated September 18, 1962	35a

INDEX TO AUTHORITIES CITED

Page

Samuel G. Albert v. United States District Court for the Western District of Michigan, Northern Division, 283 F. 2d 61 (CA 6, 1960) Cert. denied 365 U.S. 828 (1961) 20, 21, 29, 30
Barsky v. Holtzoo, No. 126 Misc. April Term, 1947 31
Beacon Theatres, Inc. v. Westover, 1959, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. F. 2d 988 34
Berger v. United States, 255 U.S. 22, 30 ..... 2, 23, 27, 29, 37
Black v. Boyd, 248 F. 2d 156 33
Collier v. Picard, 237 F. 2d (CA 1956) 20
Cuddy v. Otis, 1929, 33 F. 2d 577 31
Egan v. The City of Aurora et al, 365 U.S. 514 20
Ex parte American Steel Barrel Company and Seaman, 230 U.S. 35 24
Ex parte Simons, 1918, 247 U.S. 231, 38 S. Ct. 497, 62 L. Ed. 1094 34
Ex parte United States, 287 U.S. 241 32
Foster v. Medina, 1948, 170 F. 2d 632, certiorari denied 1949, 335 U.S. 909, 69 S. Ct. 412, 93 31
Gladstein v. McLaughlin, 1955, 230 F. 2d 762 32
Glasgow v. Moyer, 225 U.S. 420 24
Green v. Murphy, 259 F. 2d (CA 1958) 21, 28, 29, 30, 31, 32, 33, 34, 35
Henry v. Speer, 201 Fed. 869 ..... 24, 25, 27, 31
Hurd v. Letts, 152 F. 2d 121 (CADC 1945) 21, 30
In re Green, 160 F. 2d 517, 519 32
In re Josephson, 218 F. 2d 174, 177 34
In re Lisman, 1937, 89 F. 2d 898 ..... 31, 33
In re Union Leader Corporation, CCAL, 292 F. 2d 381 (1961) 33, 34
In re United Shoe Machinery Corporation, CCA 1, 276 F. 2d 77 (1960) 33
Korer v. Hoffman, 212 F. 2d 211 (CA 7, 1954) 21, 30
La Buy v. Howes Leather Company, 352 U.S. 249 ..... 22, 34
Minnesota & Ontario Paper Co. v. Molyneaux, 1934, 70 F. 2d 545 ..... 31, 32, 33
United States District Court v. Bradt, Sept. 21, 1961, 294 F. 2d 879 13
United States v. Ritter, 10 Cir., 1959, 273 F. 2d 30, 32, certiorari denied, 362 U.S. 946, 950, 80 S. Ct. 863, 4 L. Ed. 2d 869 35
Williams v. Kent, 1954, 216 F. 2d 342 ..... 20, 31, 32, 33
Moores Federal Practice, Paragraph 54, P. 68 35

STATUTES: Page

28 USCA Sect. 144 ..... 3, 7, 22, 23, 29, 37
28 USCA Sect. 1254 2
28 USCA Sect. 1332 22
28 USCA Sect. 1651 (a) 2, 3, 4, 22, 23, 30, 32, 33, 35, 37
Rule 36, Federal Rules of Civil Procedure 5, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

MERRITT-CHAPMAN & SCOTT CORPORATION, *Petitioner*

v.

W. WALLACE KENT, Judge of Said Court, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Merritt-Chapman & Scott, your petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on November 26, 1962.

(a) JUDGMENT SOUGHT TO BE REVIEWED

The judgment herein sought to be reviewed was dated and filed for entry by the Clerk of the Sixth Circuit Court of Appeals on November 26, 1962, in Action No. 15196, and is unreported as yet. (Copy of opinion attached hereto as Appendix A.)

(b) STATUTORY PROVISIONS CONFERRING JURISDICTION

The following statutory provisions confer jurisdiction upon this Court to review said judgment by writ of certiorari:

1. 28 United States Code Annotated, paragraph 1254,

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;—

2. 28 United States Code Annotated, paragraph 1651,

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

(c) QUESTIONS PRESENTED FOR REVIEW

1. Under Section 144, 28 United States Code Annotated, what is the duty and power of the trial judge against whom an affidavit of bias and prejudice is filed: Does a filing of an affidavit of personal bias and prejudice compel his retirement from the case or can he exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them? (see similar question, *Berger* v. *United States*, 255 U.S. 22, 30)

2. Where an affidavit of bias and prejudice and a motion are filed with a trial judge pursuant to 28 U.S.C.A., paragraph 144, and denied by the trial judge who patently went behind the facts alleged in the

affidavit, and thereafter an original action in the nature of a petition for a writ of prohibition is filed with the appellate court, alleging the filing of the affidavit of bias and prejudice and the facts therein contained, the denial by the trial judge and other facts and circumstances prior to and subsequent to its denial, showing that the trial judge is disqualified to continue as presiding judge, does the All Writs Statute 28 U.S.C.A. 1651 (a) give to the appellate court the power to consider that petition so that the appellate court is called upon to exercise its discretion, under all of the facts and circumstances set forth, as to whether or not the petition should be granted?

(d) STATUTES INVOLVED

The statutory provisions which this case involves are:

1. Section 144, 28 United States Code Annotated:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, C. 139, Sec. 65, 63 Stat. 99."

2. Section 1651 (a) 28 United States Code Annotated:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

(c) STATEMENT OF FACTS

1. On September 6, 1960, the Mackinac Bridge Authority, a Michigan corporation, filed its complaint in the United States District Court for the Western District of Michigan, Northern Division, Civil Action 761, against Merritt-Chapman & Scott Corporation, a Delaware corporation, and Prepakt Concrete Company, an Ohio corporation, as defendants, claiming damages of $750,000.

2. On November 14, 1960, petitioner filed its answer to said complaint, but it expressly alleged that it had had insufficient time to sort out and deliver to its counsel its voluminous files pertaining to the case, that it was filing an answer because of the refusal of plaintiff's counsel to grant an extension of time, and that it was certain that petitioner would desire at a later date to file an amended answer and that other pleadings would be addressed to the complaint.

3. On January 27, 1961, petitioner filed a motion to dismiss counts 2 to 7 inclusive of plaintiff's complaint (see Appendix B), or in the alternative to require the amendment thereof, but respondent never entered an order on this motion and it was not until more than 14 months later that plaintiff amended its complaint on April 12, 1962. The amended complaint is still subject to objections and a motion as to petitioner's further objections is ready for filing except for the fact that

petitioner is fearful of placing itself in the hands of respondent to any degree whatsoever.

4. As a part of its discovery proceedings under Rule 36, Federal Rules of Civil Procedure, petitioner, prior to June 19, 1962, prepared 327 requests for admission by plaintiff, Mackinac Bridge Authority, and in the interest of time, offered to permit plaintiff's counsel to examine, in petitioner's office, the documentary basis for all of said requests, and there are further requests which petitioner wishes to make depending entirely upon the outcome of the ruling of a court upon petitioner's objections to the present responses. This is only one of many petitions, motions, or other discovery proceedings which petitioner is fearful of bringing in respondent's jurisdiction.

5. Plaintiff's counsel did, pursuant to said offer, prior to June 19, 1962, examine said documentary basis. On June 19, 1962, when said 327 requests for admission were served, the parties stipulated the plaintiff should have forty days in which to answer said requests. Plaintiff did not answer the first 327 requests within the stipulated time.

On August 1, 1962, petitioner served an additional 45 requests for admission upon the plaintiff, and plaintiff did not comply with the 10-day limitation of Rule 36 by several days as to the last 45 requests, although plaintiff was also aware of the basis for the latter requests.

6. On August 10, 1962, counsel for petitioner and plaintiff met in chambers with respondent, and, without prior notice and over objection by petitioner, respondent informally granted to the plaintiff an additional ten days for response by plaintiff and no order

to petitioner's knowledge was ever entered by respondent.

7. That later on September 21, 1962, in referring to the chamber conference of August 10, 1962, respondent failed to refer to the fact that petitioner's counsel had on August 10, 1962, advised respondent that he intended to be in New York the following week for certain visual medical services and for consultation with petitioner, but respondent, on the next working day, August 13, 1962, entered an order requiring the reappearance of petitioner's counsel in Grand Rapids despite assurances which respondent had given to counsel, and respondent never specifically denied the allegations contained in the petition for mandamus filed with the Sixth Circuit Court of Appeals on September 26, 1962, in which petitioner alleged that there was antagonism and partiality on the part of respondent and that there was a deterioration of normal and ordinary relationships between respondent and petitioner.

8. Upon the failure of plaintiff to respond within the extended time, on August 21, 1962, petitioner filed with respondent a motion that he enter an order that plaintiff, by its failure to respond, be deemed to have admitted petitioner's requests. Upon the failure of respondent to set said motion for hearing prior to September 7, 1962, petitioner on that date filed a second motion asking for immediate action on the August 21 motion, and finally, respondent noticed said motion for hearing on September 18, 1962, remaining adamant that the case should be tried on October 1, 1962, which was the date that he had previously set for trial, in spite of the fact that on many occasions petitioner had brought to the attention of respondent that it had many months of pre-trial work before trial. These state-

ments were always met with the retort that all of petitioner's motions would be heard one hour before trial on the date set, and respondent repeated that the business of the court would not allow the respondent to hear any motions prior to trial.

9. On September 17, 1962, New York counsel for petitioner wired Mr. Joseph F. Deeb, who is in active charge of said case in the United States District Court as follows:

"JOSEPH F. DEEB, MESSRS. DEEB DUNN & ELFERDINK
SUITE 600 MICHIGAN TRUST BLDG GRAND RAPIDS MICH.
I HAVE ADVISED MERRITT CHAPMAN & SCOTT CORPORATION AS TO THE FACTS WHICH YOU HAVE JUST COMMUNICATED TO ME. SOME OF THOSE FACTS WITH RESPECT TO COURT PROCEDURE I KNEW BEFORE OTHER FACTS DEALING WITH THE TRIAL JUDGE'S RELATIONS OUTSIDE OF COURT WITH PLAINTIFF'S COUNSEL WE HAD NOT KNOWN BEFORE. BECAUSE THESE ADDITIONAL FACTS ARE OF SUCH A SERIOUS NATURE VIEWED IN THE LIGHT OF THE REMAINING FACTS REFERRED TO WE REQUEST THAT YOU IMMEDIATELY CONTACT THE COURT AND REQUEST THAT THE COURT HOLD IN ABEYANCE ANY AFFIRMATIVE ACTION IN BEHALF OF THIS DEFENDANT PENDING DETERMINATION AS TO WHAT COURSE IT WILL TAKE WITH RESPECT TO THE TRIAL JUDGE. THAT MATTER SHOULD BE DETERMINED TODAY.

JAMES J. A. GALLAGHER"

10. Thereupon, on September 18, 1962, prior to the time set for hearing on said motion, Mr. Deeb prepared and hand-delivered to respondent's secretary a letter, pursuant to the request in the telegram, with a copy thereof attached, and referring to the possibility of the filing of an affidavit of bias and prejudice under Section 144, 28 U.S.C.A. and stating that if the affidavit were filed, and until the matter was disposed of, the present status of the case should be maintained and petitioner should not ask affirmative action by the court upon defendant's motion. (Copy of letter and telegram in Appendix C.) When this letter was hand-

delivered, respondent refused to discuss the matter and passed petitioner's counsel without speaking where he was sitting in respondent's waiting room.

11. Upon that same date, September 18, 1962, respondent, upon being informed that an affidavit of bias and prejudice would be filed, set the affidavit for hearing on September 21, 1962, and also set for that same time a hearing upon the pending motion that the plaintiff be deemed, by reason of its failure to answer, to have admitted said requests for admission by petitioner, and on that same date the Grand Rapids daily newspaper carried an account of the fact that respondent was among those designated to receive the highest honor in Freemasonry in Philadelphia the following week in sessions to be presided over by George E. Bushnell, Sr., an attorney who was a part of the law firm opposing petitioner. (Copy of press release attached as Appendix H.)

12. On September 19, 1962, the affidavit of Mr. Myles C. Mc Gough, Executive Vice President of petitioner, certification of counsel, and motion of petitioner were filed with the court.

13. The affidavit of bias and prejudice dated September 17, 1962, stated:

> "Affidavit of Prejudice—Civil Action No. 761
>
> Myles C. Mc Gough, being duly sworn, deposes and says:
>
> "1. I am the Executive Vice-President of Merritt-Chapman & Scott Corporation, defendant herein, and I make this affidavit on its behalf.
>
> "2. I believe that the Honorable W. Wallace Kent, Judge of the United States District Court in which this action was commenced and is now pending,

before whom it is to be heard has a bias or prejudice in favor of the Mackinac Bridge Authority, plaintiff herein, and the reason for such belief is as follows:

"(a) The plaintiff in this case is represented by the legal firm of Miller, Canfield, Paddock and Stone of Detroit, Michigan.

"(b) Mr. George Bushnell, Sr. acts as counsel for said firm and his son, George E. Bushnell, Jr., is an active member of said firm.

"(c) George E. Bushnell, Jr. is active in all matters pertaining to this case and it was announced more than a year ago that he will act as trial attorney for the plaintiff in this case.

"(d) Mr. George E. Bushnell, Sr. is the Sovereign Grand Commander of the Ancient Accepted Scottish Rite of Free Masonry for the Northern Masonic jurisdiction of the United States of America.

"(e) That the highest degree awarded by the Scottish Rite of Free Masonry is the 33rd Degree so-called; it is honorary in character and a matter of great value to members of the Masonic Fraternity, and so regarded, as well by non-members thereof; and further, that George E. Bushnell, Jr. has already been awarded honorary membership in the Supreme Council 33rd Degree Valley of Detroit.

"(f) Honorable W. Wallace Kent recently was Grand Master of the Grand Lodge Free and Accepted Masons of the State of Michigan, and at this date is a member of the Secret Fraternal organization of which said Mr. Bushnell, Sr. is and was the Sovereign Grand Commander; and that the said Judge W. Wallace Kent has been offered and has accepted, subject to the conferring thereof, an honorary membership of the Supreme

Council 33rd Degree of said Ancient Scottish Rite of Free Masonry; that conferring of said Degree will be conducted in proceedings in a secret meeting in Philadelphia, Pennsylvania, which will commence on or about September 24, 1962, all to the best of this deponent's knowledge and belief.

"(g) That this deponent is informed that said honorary degree was offered to Judge W. Wallace Kent during the pendency of this litigation and after the commencement thereof, and this deponent believes that the trial judge should either have refused that high honorary degree so long as the present counsel represented plaintiff and this case was pending, or the trial judge, upon agreeing to accept said high honor, should have voluntarily withdrawn from this case, and further, that to the best of this deponent's knowledge and belief, the offer of the high honor referred to above to the said Judge W. Wallace Kent could not have been made without the knowledge and consent of the said Sovereign Grand Commander George E. Bushnell, Sr.

"(h) That these facts having occurred, and whether or not the said Judge W. Wallace Kent should now refuse said high honor, his relationships aside from this court room in the respects narrated in the foregoing, should disqualify him because of bias or prejudice in favor of plaintiff.

"(i) That the prejudice and bias claimed by this deponent for defendant, Merritt-Chapman & Scott Corporation to the best of deponent's knowledge and belief has already been demonstrated in certain ways to the benefit of plaintiff and to the irreparable detriment of defendant, Merritt-Chapman & Scott Corporation, and that the said trial Judge W. Wallace Kent has made it impossible for defendant, Merritt-Chapman & Scott Corporation, to complete its present discovery proceedings, as well as further discovery proceedings prior to the

date again set within the past few days by the said trial judge.

"(j) Deponent again states every fact herein, and that by reason of the foregoing facts said trial Judge W. Wallace Kent is disqualified to continue in this action.

"(k) If these facts had been disclosed to this deponent at an earlier date, defendant Merritt-Chapman & Scott Corporation would have filed an affidavit of prejudice thereupon in connection therewith.

"Further deponent sayeth not.

S Myles C. Mc Gough
Myles C. Mc Gough

"Subscribed and sworn to before me this 17th day of September, 1962.

S William C. Finneran, Jr.
William C. Finneran, Jr.
Notray Public, State of
New York
No. 60-1221150.
Comm. Exp. 3 30 63"

14. The sole question raised by the affidavit rests upon the fact that outside of the courtroom respondent was going to receive an honor of great value,—at the hands of a person listed as a part of opposing counsel's firm, who was also the Sovereign Grand Commander of the Scottish Rite,—which would enable him to join a group of distinguished citizens, and the respondent, at the hearing on September 21, 1962, had the audacity to make an unseemly reference to the Chief Justice of the United States, which reference was so phrased as to suggest that the affidavit included the Chief Justice.

15. A simple reading of the affidavit and the transcript of the proceedings on September 21, 1962, (Appendix D) will establish that respondent, after admitting that he must accept as true the facts stated in the petitioner's affidavit, immediately went behind the affidavit and sought to make it appear that petitioner's affidavit was an assault upon all Masonry, when as a matter of fact it was a motion against the respondent and personal only as to respondent.

16. As already indicated, the bias and prejudice claimed by the deponent had already demonstrated itself to the benefit of the plaintiff and the irreparable detriment of defendant, Merritt-Chapman & Scott, petitioner.

17. Respondent admitted he planned to participate in secret fraternal proceedings in Philadelphia, Pennsylvania, and he did participate, during at least most of the working week of September 24, 1962. In any event, he was not available after Sunday, September 23, 1962, and hotel accommodations in Philadelphia had been reserved as early as June, 1962, at the same hotel as plaintiff's attorney. Whether plaintiff's trial attorney, Geo. E. Bushnell, Jr. participated is not a matter of certainty, although his father was required to preside and, so far as petitioner can ascertain, did preside.

18. On September 21, upon the hearing of the affidavit of bias and prejudice and its accompanying motion, respondent denied both the affidavit and motion on the basis of statements of fact which he made concerning Freemasonry generally, and the Scottish Rite in particular, (although no attack had been made upon the Masonic Order, and just the opposite was stated in the affidavit).

19. Respondent further stated the motion was not timely because of facts which he stated an attorney of petitioner had notice of, or should have had notice of, and he concluded that this notice was binding upon petitioner, although even if respondent's claims were true, only the party litigant and not his attorney can make an affidavit of bias and prejudice.

20. If the same latitude which respondent assumed in going outside of the record is followed in this case, the record of claims of bias and prejudice of respondent in other matters is available, for example, the opinion of the Sixth Circuit Court of Appeals in *United States District Court* v. *Bradt*, Sept. 21, 1961, 294 F.2d 879, which amounts to a serious castigation of same respondent, and considered with petitioner's affidavit of bias and prejudice in the instant case, almost exactly a year later, seriously questions the ability of respondent to act upon the bench in an impartial manner upon questions inherent in the magnitude and complexities of this case.

21. In the same proceeding in which respondent denied the affidavit of bias and prejudice, he dictated upon the record his opinion denying the motion of petitioner that plaintiff be deemed to have admitted requests for admission of petitioner by reason of failure to answer within the time ordered, although he admitted that he had, without prior notice, on August 10, 1962, given the plaintiff ten days' continuance before it was again in default, and the record shows that at least ninety days elapsed between the time that petitioner's original 327 requests were filed and September 21, 1962, when respondent ruled on petitioner's motion, and there then remained but nine days before the date when respondent continued to be insistent the case was

to be tried upon Oct. 1, 1962, and that situation, upon petition for mandamus to the Circuit Court of Appeals, led to the intervention of that Court by a stay of proceedings. (Appendix D)

22. As a part of petitioner's petition for a writ of prohibition in the Court of Appeals, it alleged that the bias and prejudice of respondent were clearly demonstrated in the fact that respondent criticized petitioner at the same proceeding for petitioner's motion resulting from plaintiff's failure to answer its requests for admissions earlier than the time respondent had gratuitously extended, *but respondent did not criticize plaintiff, which was in default, for its delays*, and made no favorable comment upon the fact that petitioner had offered, and plaintiff had accepted the offer, to examine petitioner's records and files which were the basis for its requests for admissions.

23. Respondent went entirely outside of the record to comment upon the fact that the Chief Justice of the United States, among others, is a 33rd Degree Mason and that unseemly reference by respondent has been accepted by petitioner as an attempt to induce fear upon petitioner that it should not pursue the matter contained in its affidavit of bias and prejudice.

24. In respondent's same opinion, a part of the prejudicial hearing, respondent further noted critically that counsel for petitioner had not given any indication in the chamber hearing of August 10, 1962, of its intent to exact the "procedural penalty of default," but he admitted lack of prior notice to petitioner for an extension, and petitioner's refusal to agree, but respondent did not and has not to this date entered any order to substantiate the extension given.

25. Therefore, respondent's statement that petitioner's motion came as a complete surprise to him and that *he assumed* "it was an equal surprisse to counsel for plaintiff," is certainly biased, since respondent was well aware of the extent to which plaintiff's responses had been delayed with assistance of respondent's order and the effect of that delay upon any possibilty of petitioner completing its discovery under Rule 36 prior to October 1, 1962, the date respondent had been adamant in setting for trial, *and respondent also knew that petitioner, on August 17, 1962, had refused in writing to stipulate any further extension* as respondent was surprised on Sept. 21, 1962, *both for himself and for plaintiff!* Petitioner's attorney would not, at that point, have been at all surprised if respondent had then and there announced himself as co-counsel for plaintiff.

26. Respondent's personal bias and prejudice were further evidenced in the hearing on September 21, 1962, by his direct characterization of petitioner's motion of August 21, 1962, as "trial by ambush",—meaning stealth, trickery and device to entrap.

27. On the same day, September 21, 1962, that respondent denied petitioner's affidavit of prejudice, petitioner caused to be delivered to the respondent, at his home in Kalamazoo, a motion for continuance in which it set forth the necessity that it be allowed further time in connection with its discovery proceedings. Respondent refused to accept petitioner's motion at his residence, but directed that the motion be filed the following day, September 22, 1962, and he was positive in stating that the motion for continuance could not be heard until date of trial, October 1, 1962. (A copy of said motion is attached hereto as Appendix E.)

28. Because of the impossibility of completing discovery proceedings under the orders of the court, petitioner, upon September 26, 1962, filed with the Sixth Circuit Court of Appeals a petition for mandamus praying for a continuance, and upon the filing, a stay of proceedings was granted by that court pending determination of said petition. The order staying the proceeding read as follows:

> "IT IS ORDERED that the Respondent, the Honorable W. Wallace Kent, United States District Judge for the Western District of Michigan, show cause, if any he had, on or before October 15, 1962, why the prayer of said petition should not be granted, and until said petition has been heard and determined, further proceedings in the action in the District Court are stayed."

29. On October 12, 1962, the court amended the stay of proceedings as follows:

> "IT IS ORDERED by the Court, sua sponte, that the stay heretofore granted herein be modified so as to stay only the trial of the case in the District Court on its merits, leaving the court and the parties free to proceed in respect to all other matters."

30. Because of the antagonistic, partial and even vehement attitude of respondent, petitioner has to this date feared that respondent could not consider any further pretrial motions and matters without personal bias and prejudice.

31. The answer to that petition for mandamus was not executed by respondent, but an answer was filed signed by George E. Bushnell, Jr., appearing as his attorney, (who with his firm is understood to be upon a speculative fee basis with plaintiff of Public Au-

thority, and if so, would have a direct financial interest in the outcome), and that answer did not specifically reply to the petition filed. By reason of the failure of respondent to reply to the following allegations of said petition for mandamus, the respondent admitted the following:

> "Further, that the trial judge, by arbitrarily limiting discovery procedures, by informally allowing extensions of time to the Plaintiff for its responses under Rule 36, by denying Petitioner's Motion for an Order that the Plaintiff be deemed, pursuant to the plain language of Rule 36, to have admitted the Petitioner's Requests for Admissions by failing to act promptly with respect to your Pefitioner's Motion dated August 20, 1962, and by treating the requirement of Rule 36 as being suggestive and directory rather than mandatory, and by setting the trial of this cause on October 1, 1962, and by failing to grant your Petitioner a continuance beyond that date for the reasons set forth in that Motion, and for the facts as related in this Petition, has effectively and completely denied to your Petitioner its right to a fair and reasonable use of the discovery procedures referred to as a basis for its preparation for trial, including consultation with experts, and that unless a continuance is ordered by this Court, your Petitioner will be irreparably damaged."

and the petition further alleged that the facts referred to had resulted in an obvious and complete deterioration of normal relations between petitioner and trial judge, and that allegation has never been denied.

32. The transcript of the proceedings on September 21, 1962, which lasted less than one hour, was not received from the trial court reporter until October 16, 1962. It appears the court reporter was given leave

by respondent for the week of September 24, 1962, while respondent was in Philadelphia, after respondent had repeatedly stated, both on and off the record, that the business of the court would not allow any further pre-trial hearing.

33. Although the petition for mandamus which was pending before the Circuit Court of Appeals had not been decided, petitioner after receipt of transcript, commenced its preparation of a petition for writ of prohibition which it filed with the Circuit Court of Appeals on November 10, 1962, in which it referred to the relief granted by the Circuit Court of Appeals Order of September 27, 1962, and petitioner asked that Court to take judicial notice of the record in the mandamus proceedings,—which it apparently did,—at least no objection has ever been made by respondent or by the Court of Appeals.

34. The petition for prohibition was based not only upon respondent's denial of the motion and affidavit of prejudice, but also upon the other facts and circumstances above referred to which indicate that there was bias and prejudice on the part of respondent. It is the duty of the Court of Appeals, to make inquiry into complaints against a trial judge, not for the benefit of any party litigant, but in order to preserve the integrity and the freedom from personal prejudice and bais in the functioning of the trial courts.

35. On November 19, 1962, the Sixth Circuit Court of Appeals, conditionally, denied petitioner's petition for writ of mandamus and allowed respondent to proceed with the hearing of petitioner's motion for continuance before respondent.

36. In the opinion of the court upon mandamus, it apparently proceeded upon the assumption that peti-

tioner had had sufficient continuance, but it gave no weight to petitioner's intense fear of the complete partiality of respondent, and this continues to be the situation in connection with any hearing upon any petition or motion arising out of plaintiff's failure to respond to petitioner's 372 Requests for Admission under Rule 36 (Federal Rules of Civil Procedure); any hearing directed to plaintiff's Amended Complaint; any hearing upon petitioner's amendment of its Motion for Summary Judgment; any rulings which respondent might be called upon to make in connection with questions on depositions taken by petitioner of persons within the jurisdiction, because of refusals of the person being questioned to answer or because of evasive answers. In this latter respect the mere fact that matters were pending before the Circuit Court of Appeals had a restraining influence.

37. Respondent required the presence of petitioner's attorney at a hearing in Marquette, 1:30 P.M., December 17, 1962, and made no change in the date in spite of petitioner's application thereafter made to the Court of Appeals—for stay of proceedings. A qualified denial of stay of proceedings by the Circuit Court of Appeals was telephonically received on December 14, 1962. Copy of order was received December 17, 1962 at Grand Rapids.

38. The only business of the trial court, so far as could be ascertained involved petitioner's motion for continuance dated September 21, 1962,—a hearing of less than an hour,—and a short hearing involving Rule 20, Rules of Criminal Procedure, etc.

39. Petitioner was subjected to great expense and effort to make the trip to Marquette upon its motion, although more important matters had been disposed of

in Grand Rapids, Michigan, and, although petitioner claimed it did not, in view of respondent's knowledge of this petition, desire to be placed in any position wherein respondent could claim that petitioner had injured its position as to the instant matter, respondent gave petitioner every assurance that petitioner was saving its position as though respondent were the United States Supreme Court all by himself.

40. On November 26, 1962, the Circuit Court of Appeals denied Merritt's Petition for Writ of Prohibition "on the authority of Samuel G. Albert vs. United States District Court for the Western District of Michigan, Northern Division, 283 F.2d 61 (CA 6, 1960), cert. denied 265 U.S. 828 (1961)." (Copy of opinion attached as Appendix F.)

41. Reference to the Albert case cited shows that that was an original action in mandamus or prohibition or both to compel this same respondent to certify his disqualification to hear a certain pending action and to prohibit him from conducting further proceedings therein because of his personal bias and prejudice.

42. The basis for petition was the denial by the district judge of the affidavit. In that case the Court of Appeals, on the authority of *Collier* v. *Picard*, 237 F.2d (CA 1956), held that the order of the district judge in refusing to disqualify himself was not reviewable upon appeal until after final judgment had been entered. In the *Albert* case the court did not make any distinction between the direct appeal in the *Collier* case, which it cited, and the fact that the *Albert* case was an original action filed with it. It is interesting to note, that *Williams* v. *Kent*, 216 F.2d 342 in the Sixth Circuit Court of Appeals involves the same trial judge.

43. Further, in the *Albert* case after a consideration of the general nature of a mandamus action, the court stated that the action of the trial judge with respect to the affidavit of prejudice and bias was a judicial act and that mandamus was not a proper remedy to compel a judge to recuse himself, and in support of that statement it relied upon *Green* v. *Murphy*, 259 F.2d (CA 1954); *Korer* v. *Hoffman*, 212 F.2d 211 (CA 7, 1954); and *Hurd* v. *Letts*, 152 F.2d 121 (CADC 1945). The cases cited support the statement made in the *Albert* case. (A copy of the opinion in *Albert* v. *United States District Court*, 283 F.2d 61 (CA 6, 1960) cert. denied, 265 U.S. 828 (1961) is attached hereto as Appendix F.)

44. Upon application to the Circuit Court of Appeals for stay of proceedings pending this petition for certiorari, the petition was denied, however, "without prejudice to renewal of the motion, in the event the District Court assigns the case for trial before the Supreme Court has acted." (Copy of that order is attached as Appendix G.)

45. The Sixth Circuit Court of Appeals used the *Albert* case as authority for taking a position in this case which that case does not support. In using the *Albert* case the Sixth Circuit has now joined those circuits holding categorically that denial by a district judge of a motion to disqualify upon an affidavit of prejudice is not reviewable in an original action for mandamus or prohibition before the Circuit Court of Appeals. In the present case the court aligned itself with the *Green* and *Korer* and *Hurd* cases. It refused to pass upon the sufficiency of the allegations in the affidavit of bias and prejudice.

(g) BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was based upon the fact that Civil Action #761 was between citizens of different states and the matter in controversy exceeded the sum of Ten Thousand Dollars ($10,000), exclusive of interest and costs, and the District Court had jurisdiction thereof under Section 1332, 28 United States Code Annotated.

(h) REASONS SUPPORTING REVIEW BY THIS COURT ON CERTIORARI

In the construction of Section 144 and 1651 (a) 28 U.S.C.A. involving the application of those sections to proceedings in connection with the filing and review of affidavits of bias and prejudice and accompanying motions to disqualify, the decisions of the United States District Courts and the United States Court of Appeals are in conflict with each other and with the decisions of this court in respect thereto. Also, by reason of said conflict, the Circuit Court of Appeals for the Sixth Circuit has so far sanctioned a departure from the usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(i) ARGUMENT IN SUPPORT OF REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons stated above for the exercise of its jurisdiction actually arise from a conflict in the interpretation of two different sections of the Judicial Code. The first of these sections, present section 144, former Section 25, of the Judicial Code, 28 U.S.C.A., states the conditions surrounding the use of an affidavit of prejudice and bias, and that section reads as follows:

"Bias or prejudice of judge.

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith." As amended May 24, 1949, c. 139, paragraph 65, 63 Stat. 99.

The second section of the Judicial Code which we refer to, Section 1651(a), 28 U.S.C.A., is directly involved by the interpretation which the appellate courts have made of their power or lack of power under that section with respect to original petitions for writs of mandamus or prohibition based upon a claim that a United States District Judge is biased or prejudiced.

In the construction of Section 144, decisions of the appellate courts, and the decision of the appellate court in this case, are at variance with the decisions of this court and with the decisions of other Circuit Courts of Appeals.

In *Berger* v. *The United States*, 255 U.S. 22, this court construed Section 144, (then Section 21) upon an appeal after sentence and conviction in the District

Court. The question before the court was stated substantially as follows:

> Under Section 21 (now Section 144, 28 United States Code Annotated), what is the duty and power of the trial judge against whom an affidavit of bias and prejudice is filed? Does a filing of an affidavit of personal bias and prejudice compel his retirement from the case or can he exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them?

Between the adoption of this section of the Judicial Code in 1911 and a consideration of the section in the Berger case, two previous decisions of the court, *Glasgow* vs. *Moyer*, 225 U.S. 420, and *Ex parte American Steel Barrel Company and Seaman*, 230 U.S. 35, had referred to that section. In the *Glasgow* case the section was not passed upon, and in *Ex parte American Steel Barrel Company and Seaman*, the phase of the section before this court in the *Berger* case was not presented. The result was that this court in the *Berger* case stated that the issue presented was practically of first impression.

In referring to previous cases in the circuit construing Section 21, the court quoted the following language from *Henry* vs. *Speer*, 201 Fed. 869 (CCA 5):

> "Upon the making and filing by a party of an affidavit under the provisions of Section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient, then he has no other or further duty to perform than that described in Section 20 of the Judicial Code. He is

> relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

After quoting the words of the statute the Court said,

> "There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction, its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of a designation of another."

As to the claim that the purpose of the requirement was to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant, this court said,

> "It is in effect urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose, that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and other less extensive use as pointed out by Judge Meek in *Henry* vs. *Speer supra*. It is a precaution against abuse, removes the averments and beliefs from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of

the penalties attached to perjury. Nor do we take that this view gives room for frivolous affidavits. Of course, the reasons and facts for the beliefs the litigant entertains are an essential part of the affidavit, and must give full support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of the defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward the defendants."

And then speaking for the court, Mr. Justice McKenna says,

"But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate, we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. *Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed 'shall be designated in the manner prescribed in the section last preceeding, or chosen in the manner prescribed in Section 23 to hear such matter.'* And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. *The*

> *remedy by appeal is inadequate. It comes after trial, and if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.*" (Italics ours.)

The opinion of this court in the *Berger* case is cited in practically every case which we have examined, which involves the use of an affidavit of prejudice and bias or a review of the action of the District Court with respect to such an affidavit.

Some of the Circuit Courts of Appeals appear to have been unhappy with the interpretation of the statute by this court to such an extent that they have sought various ways in which to avoid the impact of the *Berger* decision. They have seized upon its language that the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," and have interpreted that language to mean that the judge against whom the affidavit is filed actually has, in direct contradiction to the language in *Henry* vs. *Speer*, "the delicate and trying duty of deciding upon the question of his own disqualification," so that respondent, who stated that he could not "in good conscience" * * * "on the basis of this affidavit * * * gracefully bow out," admitted that he would be unavailable for the week of September 24, 1962, when presumably he received the high honor referred to at the hands of the Sovereign Grand Commander without whose approval he could not have received it. If the question of the withdrawal of a judge for bias and prejudice is deleted, as it has been by some judicial decisions, from the application of clear and unambiguous provisions of the act of Congress referred

to and is left to rest upon the "good conscience" of the trial judge, a result like this, which reflects upon the entire judicial system, may well be expected.

While the opinions of the appellate courts refer to the power of the judge against whom the affidavit is filed to pass upon the legal sufficiency of the affidavit, they actually interpret that language to mean that the judge shall pass upon the question whether in his opinion the affidavit does actually prove that he is guilty of a bent of mind which prevents impartiality of judgment.

Actually that is what respondent held the statute meant in the instant case. He denied the affidavit of prejudice because he found "nothing in this affidavit which would be sufficient to demonstrate that there is a prejudice of such a character as would show 'a bent of mind that may prevent or impede impartiality of judgment' as to the justifiable matter which is before the court," and he unconcernedly went on his way to Philadelphia. The Sixth Circuit Court of Appeals, without passing upon the sufficiency of the allegations in the affidavit of bias and prejudice or of the petition for writ of prohibition in which the denial by Judge Kent of the affidavit of prejudice and bias for these reasons was a substantial part of the basis for the petition for the writ, denied the petition without reference to the affidavit.

In *Green* vs. *Murphy*, 259 F.2d 591, the action of trial judges in disregarding the clear provisions of Section 144 is evident in the following language, page 503:

> "A United States District Judge therefore possesses the jurisdiction, the power, to pass upon the question as to whether he must withdraw from

the case by reason of the allegations of his disqualification contained in the affidavit. This necessarily includes the power to decide the question wrongly as well as rightly."

The foregoing language is a far cry from the meaning and intent of the language of the *Berger* case, and is (with the possible exception of Judge Kalodner's strong dissent) an excellent example wherein by the attrition of judicial decisions, the act of Congress and the opinion in the *Berger* case have been completely emasculated.

Whatever may be the reason why a Circuit Court of Appeals has taken this view of Section 144, certainly its construction conflicts with the view of this court in the *Berger* case. The importance of *Green* vs. *Murphy* is evident from the fact that it was cited as a controlling opinion in the case of *Albert* vs. *United States District Judge*, 283 F.2d 61, and through the opinion in that case became a controlling opinion in the denial by the Sixth Circuit Court of Appeals of the petition for writ of prohibition in the instant case.

Under the authority of *Egan* vs. *The City of Aurora et al*, 365 U.S. 514, because of a conflict between the decisions of the appellate courts and this court, your petitioner submits that its petition for certiorari should be granted.

However, the conflict of opinions in the interpretation of Section 144 in support of the petition for certiorari does not stand alone in this case. It would be serious enough if all that was involved was a misinterpretation of the meaning and application of Section 144, but that misinterpretation has been coupled with a refusal on the part of the appellate courts to recog-

nize that Section 1651 (a) 28 U.S.C.A., gives them power to pass upon whether or not the District Judge has ruled properly upon the legal sufficiency of the affidavit of prejudice, prior to the time that the matter has been heard upon the merits and an appeal taken, so that appellate courts are holding not only that the judge against whom the affidavit of prejudice and bias is filed must determine whether or not it shows a bent of mind which prevents his impartially deciding the matter before him, but also that the decision that he makes on that point will not be reviewed by the appellate court until after that same judge has tried the case and it has been appealed. That was what was held in *Green* vs. *Murphy*, 259 F.2d 591, in *Korer* vs. *Hoffman*, 212 F.2d 211, and in *Hurd* vs. *Letts*, 152 F.2d 121.

In this same line of authority is the *Albert* case, above referred to, on the authority of which the within petition was denied. In the *Albert* case it was held that the action of the trial judge with respect to denying an affidavit of prejudice and bias could be reviewed only upon appeal and not upon petition for prohibition or mandamus.

Of the seven judges who sat in *Green* vs. *Murphy*, three were not satisfied with the result which was reached. There was a concurring opinion on the part of two judges to the effect that it was improper for the majority not to consider and review the sufficiency of the affidavit of prejudice involved in that case. The two who concurred contended that the appellate court should review the sufficiency of the affidavit, and then proceeded to do so. The third judge, Judge Kalodner, filed a dissenting opinion to the effect that the writ should be issued.

In that opinion Judge Kaloshner emphasized the direct conflict between the majority opinion of *Green* vs. *Murphy* and this court's opinion in the *Berger* case. He called attention to the fact that the decision in *Green* vs. *Murphy* was *contra* to the views expressed by the following Courts of Appeals in the following language (page 598):

> "Before doing so, I must immediately state that the majority's view that it cannot consider and act upon Judge Murphy's disqualification until after Green has been convicted (should that transpire) and he has appealed from that conviction to this court, is in complete disregard of Berger v. United States, 1927, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 and contra to the views expressed by the following Courts of Appeals:
>
> "*District of Columbia Circuit*
> Barsky v. Holtzoo, No. 126 Misc. April Term, 1947;
>
> *Second Circuit*
> In re Lisman, 1937, 89 F.2d 898; Foster v. Medina, 1948, 170 F.2d 632, certiorari denied 1949, 335 U.S. 909, 69 S. Ct. 412, 93 L. Ed. 442;
>
> *Fifth Circuit*
> Henry v. Speer, 1913, 201 F. 869;
>
> *Sixth Circuit*
> Williams v. Kent, 1954, 216 F.2d 342;
>
> *Eighth Circuit*
> Cuddy v. Otis, 1929, 33 F.2d 577; Minnesota & Ontario Paper Co. v. Molyneaux, 1934, 70 F.2d 762.
>
> "In the instances cited, applications for writs of mandamus and/or prohibition, based on bias and prejudice, were entertained affecting pending litigation in the district courts which had not attained

the status of final disposition and/or appealability."

Among the cases cited above is the case of *Williams* vs. *Kent*, 1954, 216 F.2d 342, in the Sixth Circuit where the Court, assuming its power to act, held that the affidavit of prejudice was not legally sufficient.

In one of the two cases in the Ninth Circuit referred to, the writ was granted Connelly, and in the other case, *Gladstein*, it was held that mandamus was a proper remedy where a District Judge had refused to disqualify himself after the filing of an affidavit of prejudice.

Judge Kalodner pointed out that in the Third Circuit also there exists a conflict in that in *In Re Green*, 160 F.2d 517, 519, the court considered and denied on the merits an application for writ of mandamus or prohibition based on bias, in a pending proceeding, although it specifically reserved for future decision the point as to whether the writ could issue in a meritorious case, whereas in *Green* vs. *Murphy*, it held review could be had only on appeal.

It is well established that the jurisdiction of the appellate court under paragraph 1651 (a) does not depend upon whether or not there is an appeal pending but depends upon whether there is a matter pending over which the appellate court in question would have appellate jurisdiction. *Minnesota and Ontario Paper Company et al* vs. *Molyneaux*, 70 F.2d 545, *Ex parte United States*, 287 U.S. 241, *La Buy* vs. *Howes Leather Company*, 352 U.S. 241.

The conflict becomes even more apparent when one considers that the Sixth Circuit Court of Appeals held under the All Writs Statute that it had the power to

issue a writ of mandamus where the right of jury trial was involved, *Black* vs. *Boyd*, 248 F.2d 156, while in the instant case it is held that it does not have the power to inquire into the propriety of a judge's action in denying an affidavit of prejudice and bias.

In addition to those cases, on the one hand, which like *Green* vs. *Murphy* have decided that Section 1651 does not apply where the basis for the petition is the bias and prejudice of the trial judge, and *Connelly* vs. *United States*, to the contrary, where the appellate court has decided that it does apply in a case of that type and that it is proper to issue a writ in that situation, there are a number of cases which represent an area which may be properly called "non-decision." These cases recognize the seriousness of the situation where the bias and prejudice of the trial judge is involved, and they pass over, without deciding, the question of the power to issue such a writ by using the phrase that they "assume" they have the power to consider the petition and then proceed to consider the petition on the merits. *Williams* vs. *Kent*, 216 F.2d 342, above referred to, in the Sixth Circuit, is a case of this kind. See also, *In re Union Leader Corporation*, CCA 1, 292 F.2d 381 (1961); *In re United Shoe Machinery Corporation*, CCA 1, 276 F.2d 77 (1960); *In re Lisman et al*, CCA 2, 89 F.2d 989; *Minnesota and Ontario Paper Company* vs. *Molyneaux*, 70 F.2d 545, CCA 8.

Why the Sixth Circuit Court of Appeals changed its practice and decided to adopt in this case the rule in *Green* vs. *Murphy* and to deny the petition for prohibition without any consideration on the merits, is not clear.

The impact of the opinion of the concurring judges in *Green* vs. *Murphy supra* and of Justice Clark's opinion in *La Buy* vs. *Howes Leather Company supra* is reflected in the recent opinion of the First Circuit Court of Appeals in the case of *In Re Union Leader Corporation*, 292 F.2d 381. There the court reconsidered its earlier opinion of *In Re Josephson*, 218 F.2d 174, 177, and said:

> "It now seems clear however that In Re Josephson we construed the words 'in aid of * * * jurisdiction' too narrowly. See *La Buy* vs. *Howes Leather Company*, 1957, 352 U.S. 249, 255, 77 Supreme Court 309, 1 law edition 2nd 290; Black vs. Sixth Circuit, 1957, 248 F.2d 156, 160-161. In a sense this may merely mean that the emphasis was placed at the wrong point. Our jurisdiction exists, *but we must decide whether there are sufficient reasons for its exercise.*" (Italics ours)

And then on page 384, the court proceeded to make the following statement which is worthy of attention:

> "But we do find exceptional circumstances in the nature of the particular claim advanced by petitioner. A trial taking place before a judge alleged to be personally biased, particularly when the claimed bias has apparently become a matter of public notice and interest, may be incompatible with the proper administration of justice. If the claim is sufficiently meritorious, the proceeding should be aborted rather than corrected. Mandamus has been held to be an appropriate remedy to secure the right to jury trial, at least where the right is clear. *Beacon Theatres, Inc.* v. *Westover*, 1959, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988; *Ex parte Simons*, 1918, 247 U.S. 231, 38 S. Ct. 497, 62 L. Ed. 1094, and seemingly even where the right is debatable, compare majority opinion *with* dissenting opinion in *Beacon Theatres, Inc* v. *West-*

orer, supra, both at page 511 of 359 U.S., at page 957 of 79 S.Ct. From the general standpoint of the interest of justice, the right to be tried before an unbiased judge is also basic in our judicial system. Although there are differences of opinion, we agree with the concurring judges in *Green* v. *Murphy*, 3 Cir., 1958, 259 F.2d 591, 595, that public confidence in the courts may require that such a question be disposed of at the earliest opportunity. In addition to the cases cited therein, see also *United States* v. *Ritter*, 10 Cir., 1959, 273 F.2d 30, 32, certiorari denied, 362 U.S. 946, 950, 80 S.Ct. 863, 4 L.Ed. 2d 869. This need not commit us to entertaining every rejected affidavit of prejudice; nor need we presently set forth the limits. It is to be borne in mind that mandamus is a discretionary writ."

Not only is there this conflict between the courts as to the question of power under Section 1651 (a) as applied to petitions for mandamus or prohibition resulting from the filing and denial of affidavits of bias and prejudice, but also it is true in jurisdictions like that of the Sixth Circuit, the question of the propriety of the district judge's action with respect to the affidavit of bias and prejudice will not be heard until after judgment on the merits and appeal therefrom. Petitioner submits that the conflict is so serious as to require the issuance of a writ of certiorari as a matter of appellate review and also is of such importance as to require the use of supervisory power of this court under the All Writs Statute.

In *Moore's Federal Practice* at paragraph 54 and subparagraphs thereof, a strong argument is made for more flexibility in the use by appellate courts of the power given to them under Section 1651 (a). On page 68 Moore summarizes the situation as follows:

> "But unless the term finality is to be warped, twisted, dragooned, and ballooned in disregard of common understanding, the final judgment rule and the statutory provisions for interlocutory orders that are non-appealable, but, nevertheless, are of such a character that postponement of review until the final judgment state is productive of injustice because of an undue impairment of a legal right, or unnecessary delay, expense, hardship, or other related factors. And here is where the All Writs Statute, Section 1651, can serve a very useful function. The problem for the appellate court is to balance the sound policy behind the general rule of finality against the claim of the individual case that justice demands a present review of the particular non-appealable interlocutory order. And in resolving the balance for or against review, it is well to recall that the power of review is present under 1651, to be used by the appellate court in the exercise of a sound discretion; and the flexibility of such discretionary review is on the whole better than enlarging the categories of interlocutory orders that are appealable as of right."

As to the merits of the original petition for writ of prohibition, the facts alleged in the affidavit of bias and prejudice, and the additional facts stated in the petition for writ of prohibition, disclose such relationships between the trial judge and certain of the plaintiff's counsel and such an attitude of mind on the part of the trial judge as to support a reasonable belief that he has personal prejudice in favor of the attorneys for the Mackinac Bridge Authority—and therefore in favor of the Mackinac Bridge Authority—which so destroys the fact and the appearance of impartiality as to disqualify him from continuing to preside as trial judge in the original case, and neither the affidavit nor the

record supports the trial judge's holding that the filing of the affidavit was not timely.

CONCLUSION

Petitioner submits, under Rule 19 of this court, that there is a conflict between the decisions of the appellate courts, and between the decisions of the appellate courts and this court, with reference to the proper interpretation of Sections 144 and 1651 (a) of United States Code Annotated and, second, that the conflict is of extreme importance in the entire federal judicial system in the way in which bias and prejudice of a judge of the district court is treated.

It is submitted that the purpose and intent of Congress in enacting the original Section 21 (present Section 144, 28 United States Code Annotated), as stated by this court in the *Berger* case will be nullified unless the within petition for writ of certiorari is granted.

In the *Albert* case the Sixth Circuit Court of Appeals closed the door upon the affidavit of bias and prejudice, but after it had closed the door it did review the affidavit and held it to be legally insufficient. In the instant case it has held that the door is not only closed until after the appeal on the merits but also that the appellate court has no power to open that door prior to that time.

The enlightened interpretation by this court of Section 21 of the Judicial Code (now Section 144), in the *Berger* case, has now been completely emasculated by a process of attrition through judicial decisions to which we have referred which have continually become narrower and more inflexible.

If the personal background and relationship set forth in the affidavit of bias and prejudice, which have arisen and continued during the pendency of this case, are objectionable, then that should be stated. If the facts appearing from the affidavit reasonably support the claim of personal bias and prejudice, that should be stated. But petitioner should not be required to go to trial before the respondent before his denial of the affidavit of bias and prejudice has been reviewed.

Above these conflicting decisions, accumulated over a period of more than fifty years, there should now arise a reaffirmation of those principles stated in the *Berger* case as necessary to the public respect for the judicial function so that the matter of the bias and prejudice of a district judge will not continue to be dependent upon so illusory a concept as what the trial judge believes should be required by his own "good conscience."

Dated:

JOSEPH F. DEEB
Attorney for Petitioner-Appellant,
Merritt-Chapman & Scott Corporation

Business Address:
600 Michigan Trust Building
Grand Rapids 2, Michigan

Of Counsel:

MANNING, HOLLINGER & SHEA
41 East 42nd Street
New York 17, New York.

Dated Feb 25, 1963